

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-2138

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SCOTT DAVID DUNKERLEY,

PETITIONER-APPELLANT

V.

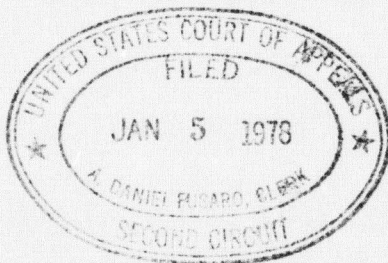
DOCKET NO. 77-2138

CORNELIUS HOGAN, In his official capacity
as Commissioner of Corrections for the
State of Vermont, and
RICHARD BASHAW, In his official capacity
as Superintendent of the St. Albans
Correctional Center

RESPONDENTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF OF RESPONDENTS-APPELLEES



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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS-----	ii - iii
I. STATEMENT OF THE ISSUE-----	1
II. STATEMENT OF FACTS-----	2 - 5
III. ARGUMENT-----	6
 WHEN A DEFENDANT BECOMES INVOLUNTARILY ABSENT IN MID-TRIAL DUE TO A LENGTHY HOSPITALIZATION, THE TRIAL JUDGE, HAVING NO OTHER VIABLE ALTERNATIVE, MAY FIND IN THE PROPER EXER- CISE OF HIS DISCRETION THAT A "MANIFEST NECESSITY"-- ABSENCE OF THE DEFENDANT FROM TRIAL--REQUIRES THE DECLARA- TION OF A MISTRIAL.	
A. THE LAW OF DOUBLE JEOPARDY UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION-----	6 - 10
B. THE DECLARATION OF THE MISTRIAL-----	10 - 17
IV. CONCLUSION-----	18

TABLE OF CITATIONS

<u>CASES:</u>	<u>PAGE</u>
<u>Cureton v. United States</u> , 396 F.2d 671 (Ct. App. D.C. 1968)-----	13
<u>Dunkerley v. Hogan</u> , F.Supp. (D.C.Vt. 1977), No. 77-140, filed 13 October 1977-----	12, 13
<u>Featherston v. Mitchell</u> , 418 F.2d 582 (5th Cir. 1969), cert.den. 397 U.S. 937-----	12
<u>Gori v. United States</u> , 367 U.S. 364 (1961)-----	7, 9, 15
<u>Government of the Virgin Islands v. Brown</u> , 507 F.2d 186 (3rd Cir. 1975)-----	13
<u>Green v. United States</u> , 355 U.S. 184 (1957)-----	6, 8, 11
<u>Illinois v. Somerville</u> , 410 U.S. 458 (1973)-----	7, 9
<u>In Re Dunkerley</u> , Vt. (1977), No. 56-77, filed 7 June 1977-----	12
<u>Jackson v. Hutto</u> , 508 F.2d 890 (8th Cir. 1975)-----	15
<u>Loux v. United States</u> , 389 F.2d 911 (9th Cir. 1968), cert.den. 393 U.S. 867, cert.den. 393 U.S. 869-----	12
<u>United States v. Dinitz</u> , 424 U.S. 600 (1976)-----	9
<u>United States v. Grasso</u> , 552 F.2d 46 (2nd Cir. 1977)-----	16, 17
<u>United States v. Jorn</u> , 400 U.S. 470 (1971)-----	8, 9
<u>United States v. Moore</u> , 466 F.2d 547 (3rd Cir. 1972)-----	15
<u>United States v. Pastor</u> , F.2d (2nd Cir. 1977), Docket Nos. 76-1364, 76-1423, filed 19 May 1977-----	13
<u>United States v. Perez</u> , 9 Wheat (22 U.S.) 579 (1824)-----	6, 7, 8, 9, 12, 15
<u>United States v. Peterson</u> , 524 F.2d 167 (4th Cir. 1975)-----	13, 14
<u>United States v. Sanford</u> , U.S. , 50 L.Ed.2d 17, 97 S.Ct. 20 (1976)-----	9
<u>United States v. Stein</u> , 140 F.Supp. 761 (D.C.N.Y. 1956)-----	12
<u>United States v. Taylor</u> , 478 F.2d 689 (1st Cir. 1973)-----	15
<u>United States v. Tortora</u> , 464 F.2d 1202 (2nd Cir. 1972), cert. den. 409 U.S. 1063-----	13, 14

Wade v. Hunter, 336 U.S. 684 (1949)----- 8, 9

Wade v. United States, 441 F.2d 1046 (Ct. App. D.C. 1971)----- 14

UNITED STATES CONSTITUTION:

Fifth Amendment----- 1, 4, 6, 7, 9,
11, 12, 18

VERMONT RULES OF CRIMINAL PROCEDURE:

Rule 43----- 13, 14, 18

Rule 43(a)----- 12

Rule 43(b)----- 12

Rule 43(b)(1)----- 3, 10, 11, 12,
13, 14, 15

MISCELLANEOUS:

Annotation, 159 A.L.R. 750----- 12

21 Am.Jur. 2d, Criminal Law, §197----- 12

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I. STATEMENT OF THE ISSUE

Did the trial judge properly and scrupulously exercise his discretion in declaring a mistrial when confronted by an involuntarily absent defendant in mid-trial such that retrial of the defendant will not be barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution?

II. STATEMENT OF FACTS

On 13 October 1976, trial of Appellant-Defendant for murder in the first degree commenced in Orleans Superior Court, Honorable Silvio T. Valente presiding, with the impaneling and swearing of a jury. The following morning, opening statements were made, and testimony of four witnesses was received.

During the morning of 15 October 1976, to be the third day in the trial, the Appellant-Defendant suffered a partially collapsed lung of 15%. (App., p. 12). The Appellant-Defendant was hospitalized shortly before 9:00 o'clock A.M. (App., p. 12). The Court appointed its own physician to examine the Appellant-Defendant. (App., p. 12). That physician and the two other physicians, who examined and treated the Appellant-Defendant and with whom the Court spoke during the course of the morning, confirmed the diagnosis and reported a prognosis of a mandatory seven to ten day hospitalization, barring further complications of the Appellant-Defendant's condition. (App., pp. 12, 16, 20, 22).

The Court convened three conferences with counsel during the course of the morning. (App., pp. 12, 15, 20). The first conference convened at approximately 9:30 o'clock A.M. (However, this time is not reflected in the official transcript.) The second conference was convened at approximately 10:15 o'clock A.M. (This time, too, is not reflected in the official transcript.) The second conference recessed at 10:35 o'clock A.M., and the third convened at 10:45 o'clock A.M. (App., p. 20).

After reporting on the Appellant-Defendant's medical condition in the first conference, the Court first raised the question of the propriety of a mistrial and asked for the parties' suggestions. (App., p. 13). Defense Counsel immediately suggested that after obtaining a voluntary, sickbed waiver

of further appearance from Appellant-Defendant, the trial could continue pursuant to Rule 43(b)(1), V.R.Cr.P. (App., pp. 13-14). The State objected to his suggestion because the absence was not voluntary, as required under Rule 43(b)(1). (App., p. 14). The State desired Appellant-Defendant's presence in the courtroom when the evidence was presented (App., p. 14), for while neither identity nor actual commission of the shooting was in doubt Appellant-Defendant's sanity during the commission of the act was in issue. Defense Counsel then further suggested continuance for the term of hospitalization and waiver of further sequestration. (App., p. 15).

During the second conference, the State again noted that the Appellant-Defendant's absence from trial was not voluntary as meant by the Rule, that Rule 43(b)(1) was therefore inapplicable, and that because of "the seriousness of the charge" the State did not want to go forward without the presence of the Appellant-Defendant, but the State did not move for mistrial. (App., p. 17). Defense Counsel responded that no rule of law nor mittimus confined Appellant-Defendant to hospital, so that if he chose to stay there his act would be voluntary. (App., p. 17). Then Defense Counsel suggested that the discretion to decide whether to continue with the trial rested with the Appellant-Defendant, not the Court:

" Now I have no question but what Scott himself will have to make the decision whether the trial should or shouldn't go on in his absence." (App., pp. 17-18).

Defense Counsel further suggested a video-taped deposition, taken in the hospital room, to be used in the trial. (App., p. 18). This action the State opposed, further stating:

" . . . [W]e don't think . . . , I at least, don't want to move for a mistrial on behalf of the State without checking to see what effect or impact this would have . . . on the jeopardy situation. I understand of course under the proper circumstances the Court can declare a mistrial. If that takes place we accept it." (App., p. 18).

Defense Counsel renewed his suggestion of continuance and waiver of or modification of sequestration. (App., p. 19).

After a ten minute recess, during which the diagnosis and prognosis of the Appellant-Defendant was reconfirmed, "the Court of its own motion . . . declare[d] a mistrial." (App., p. 20). The Court continued, stating its reasons:

" . . . I want to state upon the record that although the Court realizes this is a very serious case that from all indications as the cases preceding it, it will not be a very lengthy case when it is ultimately tried so that is one of the considerations that the Court had in mind in declaring a mistrial. That in order to insure a fair trial for the defendant here, that the Court felt in the interest of justice that a mistrial should be declared. The Court further finds of course that it wasn't any voluntary absence here. He was absent because of a medical condition. Gentlemen, the Court is now going to call the jury and advise the jury of the Court's action." (App., p. 20).

The jury was called in, advised of the Court's decision, and discharged. (App., p. 22).

Appellant-Defendant subsequently moved to dismiss the charges on the grounds that retrial would violate his Fifth Amendment right against twice being placed in jeopardy. The trial court denied this motion. A motion for permission to file an interlocutory appeal was denied by both the trial court and the Vermont Supreme Court. A petition for writ of habeas corpus was filed in Chittenden Superior Court on 10 December 1976. It was denied with written findings and order on 31 January 1977. A notice of appeal to the Vermont Supreme Court was filed on 7 February 1977. The Vermont Supreme Court affirmed the lower court by written opinion on 7 June 1977. (App., pp. 24-31).

On 14 June 1977, the Appellant-Defendant filed a petition for Writ of Habeas Corpus in the United States District Court for the District of

Vermont. On 29 August 1977, a hearing was held on the Appellant-Defendant's Petition for Writ of Habeas Corpus at the United States District Court for the District of Vermont in Burlington, Vermont, the Hon. Albert W. Coffrin presiding. On 13 October 1977, Judge Coffrin filed an Opinion and Order denying the Petition. (App., pp. 41-51). The appeal was taken to the Second Circuit Court of Appeals.

III. ARGUMENT

WHEN A DEFENDANT BECOMES INVOLUNTARILY ABSENT IN MID-TRIAL DUE TO A LENGTHY HOSPITALIZATION, THE TRIAL JUDGE, HAVING NO OTHER VIABLE ALTERNATIVE, MAY FIND IN THE PROPER EXERCISE OF HIS DISCRETION THAT A "MANIFEST NECESSITY" --ABSENCE OF THE DEFENDANT FROM TRIAL--REQUIRES THE DECLARATION OF A MISTRIAL.

A. THE LAW OF DOUBLE JEOPARDY UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The underlying purpose of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution was artfully stated by Mr. Justice Black in Green v. United States, 355 U.S. 184, 187-188 (1957):

" The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

However, the concept that the Double Jeopardy Clause is solely defendant-protective has never had a basis in the constitutional law of this country. The first and basic expression of the law of Double Jeopardy, and still the guiding rule of law, is:

". . . The law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." (emphasis added.) United States v. Perez, 9 Wheat (22 U.S.) 579 (1824).

1. "[No] person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." United States Constitution, Fifth Amendment.

This language contemplates that "all circumstances" including the "ends of public justice" are to be considered by the Court in determining whether a violation of the Double Jeopardy Clause has occurred.

And mechanical formula set forth to determine whether a Double Jeopardy violation has occurred, such as the "sole risk to the defendant" test first espoused in Gori v. United States, 367 U.S. 364 (1961), have been explicitly overruled by the Supreme Court by the following language:

" This formulation [set forth by Mr. Justice Story in United States v. Perez, *supra*], consistently adhered to by this Court in subsequent decisions, abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial. The broad discretion reserved to the trial judge in such circumstances has been consistently reiterated in decisions of this Court." Illinois v. Somerville, 410 U.S. 458, at 462 (1973).

Furthermore, in Illinois v. Somerville, *Ibid*, at 463, the Supreme Court reaffirmed that the consideration of public justice was a factor in determining whether a violation of the Double Jeopardy Clause had occurred, with the following language:

" This consideration, whether termed the 'ends of public justice,' [citation omitted], or, more precisely, 'the public's interest in fair trials designed to end in just judgments,' [citation omitted], has not been disregarded by this Court."

This is not to suggest that the protection of the interests of the individual, as defendant, is to be taken lightly in reaching the decision about a possible Double Jeopardy violation. When a trial does end in other than a final judgment, the circumstances causing the truncated trial are to be examined to determine whether the Double Jeopardy Clause will bar retrial. And when oppressive practices by the State, which the Fifth Amendment was designed to protect the individual against, are involved in the early termination of the trial, retrial will be barred. However,:

" . . . jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances . . . arise during [the first] trial making its completion impossible'." Green v. United States, supra, at 188.

One factor, which is to be weighed heavily in favor of each defendant as the Appellant-Defendant has noted, is a defendant's "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, at 689 (1949); United States v. Jorn, 400 U.S. 470, at 480 (1971). The Supreme Court has indicated, however, that this factor will not be determinative.

" . . . [A] defendant's valued right to have his trial completed by a particular tribunal must in some circumstances be subordinated to the public's interest in fair trials designed to end in just judgments." Wade, at 689; Jorn, at 480.

The Court in Wade further recognized that:

" . . . The double jeopardy provision of the Fifth Amendment does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insurmountable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practice at which the double jeopardy prohibition is aimed." Wade v. Hunter, supra, at 688.

The determinative issue will be then whether the trial judge acted properly in the sound exercise of his discretion in discharging the jury. The standard to which each trial judge will be held was first expressed by Mr. Justice Story in United States v. Perez, and it has been followed since by the Supreme Court without exception.

" . . . The law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a

sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office." (emphasis added.) United States v. Perez, *supra*, at 579-580; Cf. United States v. Sanford, U.S. , 50 L.Ed. 2d 17, 20, 97 S.Ct. 20 (1976); United States v. Dinitz, 424 U.S. 600 (1976); Illinois v. Somerville, 410 U.S. 458, 461 (1973); United States v. Jorn, 400 U.S. 470, 481 (1971); Gori v. United States, 367 U.S. 364, 368-369 (1961); Wade v. Hunter, 336 U.S. 684, 689 (1949).

As directed by the Supreme Court in Perez, the trial judge is the one who must consider all of the circumstances involved which make it an appropriate case for judicial interference. And then only in those cases where "unforeseeable circumstances" create a "manifest necessity" requiring a mistrial or when the "ends of public justice" otherwise require a mistrial will a retrial not be barred by the Double Jeopardy Clause. In making such a decision:

"Where for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing a trial, a mistrial may be declared without the defendant's consent and even over his objections, and he may be retried consistently with the Fifth Amendment." (emphasis added.) Gori v. United States, *supra*, at 368.

The key, then, to determining whether a retrial is contrary to the Double Jeopardy Clause is whether, based on a totality of the circumstances surrounding the abortive trial which are apparent to the trial judge, the trial judge properly exercised his discretion in ordering the mistrial.

Discretion is properly and scrupulously exercised if a "manifest necessity" requires a mistrial or if the "ends of public justice would otherwise be defeated" unless the mistrial was declared.

B. THE DECLARATION OF THE MISTRIAL.

On the morning of what was to be the third day in the murder trial of Appellant-Defendant, the Appellant-Defendant was hospitalized. (App., p. 12). The trial court, upon learning of the hospitalization, appointed a physician to examine Appellant-Defendant in order to ascertain his condition so that it could be determined what effect his hospitalization would have on the trial. (App., p. 12). During the course of the morning, the trial court convened three conferences with counsel to inform them of the medical opinions and to discuss what bearing this incident would have on the trial. (App., pp. 12, 15, 20). During the course of the first conference, the trial court first raised the possibility of the declaration of a mistrial and requested input from the parties. (App., p. 13). Both parties proceeded to vigorously state and argue their positions to the court during the three conferences which occurred that morning.

Defense counsel urged upon the court a number of alternatives to mistrial. The first was that the trial be allowed to continue in his absence pursuant to Rule 43(b)(1), V.R.Cr.P.,² after obtaining a sickbed

2. Rule 43(b)(1), V.R.Cr.P.:

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented whenever a defendant, initially present,

(1) in noncapital cases, voluntarily absents himself after the trial was commenced, whether or not he has been informed by the court of his obligation to remain during trial, . . .

waiver of continued presence. (App., pp. 13-14). A second alternative was a continuance of the trial and waiver of further sequestration of the jury during the continuance. (App., p. 15). A third alternative was a videotaped deposition of the Appellant-Defendant's testimony. (App., p. 18). And Defense Counsel at all times vigorously opposed a mistrial. (App., pp. 13-15, 17-18, 19, 21).

The State first argued that the Appellant-Defendant's absence was not voluntary and that, therefore, Rule 43(b)(1) was not applicable. (App., p. 14). Secondly, the State clearly stated its position that it would not proceed with the presentation of evidence in the absence of the Appellant-Defendant under any circumstances. (App., p. 14). The State again vigorously restated these two positions and suggested that mistrial may be the only alternative, but would not move for a mistrial. (App., p. 18).

After conferring for the third time with the physicians who had examined the Appellant-Defendant and receiving a corroborating diagnosis and prognosis, the trial court made findings and declared a mistrial. (App., pp. 20, 22).

In order to sustain the trial judge's decision to declare a mistrial and to permit a retrial of Appellant-Defendant, this Court must find that the trial judge scrupulously exercised his discretion in reaching his decision and that a "manifest necessity" required mistrial or the "ends of public justice" would otherwise be defeated unless the mistrial was declared. These findings can be made by the Court without doing violence to the underlying purpose of the Double Jeopardy Clause of the Fifth Amendment.

The Appellant-Defendant's hospitalization and consequent absence from trial for an expected 7-10 days (App., pp. 12, 16, 20, 22) is exactly the type of "unforeseeable circumstance" contemplated in Green v. United

States, supra, which would make completion of the first trial impossible and not bar retrial. There is a line of cases which hold that if a defendant in a criminal prosecution becomes so ill during the trial that he must be hospitalized and cannot continue in attendance, a mistrial may be declared, and retrial of the ill defendant after recovery does not contravene the double jeopardy provision of the Fifth Amendment. United States v. Stein, 140 F.Supp. 761 (D.C.N.Y. 1956); Loux v. United States, 389 F.2d 911 (9th Cir. 1968), cert.den. 393 U.S. 867, cert.den. 393 U.S. 869; Featherston v. Mitchell, 418 F.2d 582 (5th Cir. 1969), cert.den. 397 U.S. 937. See also, state cases cited in Annotation, 159 A.L.R. 750 and 21 Am.Jur. 2d, Crim. Law §197.

Additionally, Rule 43(a), V.R.Cr.P., requires presence of a defendant at every stage of his trial, unless presence is otherwise excepted, such as by voluntary absence permitted in Rule 43(b), V.R.Cr.P. Therefore, upon the finding that the Appellant-Defendant was not voluntarily absent (App.,³ p. 20), Rule 43(b)(1), V.R.Cr.P., was inapplicable, and therefore the court was faced with the "manifest necessity"--involuntary absence of the defendant--required under the Perez standard.

However, even if the trial judge had found the Appellant-Defendant voluntarily absent or if he found it was possible to transform the involuntary absence into a voluntary absence by the suggested sickbed waiver of continued presence at trial, the trial judge's decision whether to permit the trial to continue would still be discretionary, much as when he is deciding whether

3. This finding of involuntary absence has been sustained in every succeeding proceeding--In Re Dunkerley, No. 56-77 Vt.S.Ct.Opinion filed 7 June 1977, App. at 29, reflects finding of Chittenden Superior Court that absence was involuntary and the Vermont Supreme Court's concurrence in that finding. Also, Dunkerley v. Hogan, No. 77-140, U.S.D.C.Vt., 13 October 1977, App. at 46.

there is a "manifest necessity" requiring a mistrial. This situation exists because Rule 43(b)(1), V.R.Cr.P., states only that "the further progress of the trial to and including the return of verdict shall not be prevented." (emphasis added.) Rule 43, V.R.Cr.P. This language means that the common law requirement of termination of the trial because of defendant's absence is no longer mandatory. The rule only permits the trial court to proceed with the trial. There is no language in the Rule which requires the trial to continue.

"Rule 43 does not require a trial which began in defendant's presence, as here, to be continued notwithstanding the defendant has voluntarily absented himself. The language of the Rule is that such absence shall not prevent continuing the trial. This confers latitude on the Court in deciding whether to proceed or to declare a mistrial." Cureton v. United States, 396 F.2d 671 (Ct. App. D.C. 1968); United States v. Tortora, 464 F.2d 1202 (2nd Cir. 1972), cert.den. 409 U.S. 1063; Government of the Virgin Islands v. Brown, 507 F.2d 186, 189 (3rd Cir. 1975); United States v. Peterson, 524 F.2d 167, 185 (4th Cir. 1975), cert. den. ; United States v. Pastor, F.2d (2nd Cir. 1977), Docket Nos. 76-1364, 76-1423, filed 19 May 1977; Dunkerley v. Hogan, No. 77-140, 13 October 1977, App. p. 48.

In Tortora, Judge Lumbard writing for the Second Circuit stated that:

" It is obviously desirable that a defendant be present at his own trial. We do not here lay down a general rule that, in every case in which the defendant is voluntarily absent at the empanelment of the jury and the taking of evidence, the trial judge should proceed with the trial. We only hold that this is within the discretion of the trial judge, to be utilized only in circumstances as extraordinary as those before us. Indeed, we would add that this discretion should be exercised only when the public interest clearly outweighs that of the voluntarily absent defendant." (emphasis added.) United States v. Tortora, at 1210.

In United States v. Peterson, supra, at 185, the Fourth Circuit followed the reasoning of Tortora, stating that ". . . the decision whether to proceed to trial is vested in the sound discretion of the trial judge."

Again quoting Judge Lombard, the Fourth Circuit commented that:

" Even Judge Lombard conceded that it would be difficult 'to conceive of any case . . . other than a multiple defendant case' [Tortora, at 1210, fn. 7] that would present circumstances justifying the trial court's election to proceed to trial in the absence of the accused." United States v. Peterson, supra, at 185, fn. 43.

The circumstances of this matter do not rise to the level of the "extraordinary circumstances" spoken of in Tortora. In Tortora, the extraordinary circumstances were that the defendant was one of multiple defendants, that he had been present at the start of the trial, that he knew the introduction of evidence was to commence on a day certain, that he had made arrangements with his counsel for transportation on that date, and that he deliberately failed to appear for trial in an attempt to thwart the orderly process of justice. The Appellant-Defendant's involuntary absence from trial due to hospitalization, when he had no co-defendants, has none of this quality of an attempt to thwart the orderly trial process of multiple defendants, and, therefore, is not one of those "extraordinary circumstances" spoken of in Tortora which requires continuation of trial in the defendant's absence.

Such a decision, that this matter does not rise to the level of "extraordinary circumstances" even if Rule 43(b)(1), V.R.Cr.P., had been found applicable, is appropriate because "Rule [43] is designed primarily to insure defendant's presence, not to permit the trial to proceed in his absence." (emphasis added.) Wade v. United States, 441 F.2d 1046, 1048

(Ct. App. D.C. 1971); United States v. Moore, 466 F.2d 547 (3rd Cir. 1972); United States v. Taylor, 478 F.2d 689 (1st Cir. 1973); Jackson v. Hutto, 508 F.2d 890 (8th Cir. 1975).

Whether the trial judge is required to scrupulously exercise his discretion either because he feels a "manifest necessity" or the "ends of public justice" may require a mistrial, or because of the operation of Rule 43(b)(1), V.R.Cr.P., the trial judge is the one best situated to take all the circumstances surrounding the trial into consideration and to determine whether the circumstances require judicial interference with the continued proceeding of the trial and the declaration of a mistrial. Perez, supra, at 579-580; Gori, supra, at 368.

The record in this matter reflects that the trial judge was scrupulous in the exercise of his discretion. After learning of the Appellant-Defendant's hospitalization, the trial judge obtained the medical opinion of three physicians which reflected a consensus of a minimum necessary hospitalization of 7-10 days, barring complications. (App., pp. 12, 16, 20, 22). The length of hospitalization was therefore indeterminate, and this consideration was reflected in the judge's decision. (App., p. 20).

The trial judge rejected Defense Counsel's primary suggested alternative to mistrial by finding that Appellant-Defendant's absence was involuntary (App., p. 20) and that therefore Rule 43(b)(1), V.R.Cr.P., could not apply. And in rejecting the suggested alternative of continuance and dispersal, the trial court considered the continued serious nature of a first degree murder case (App., p. 20), the indeterminate length of hospitalization which even at the stated estimate of 7-10 days would be far longer than the time needed to try to case (App., p. 20), and the need for fairness to the defendant (App., p. 20). This was not a hasty decision by the trial

judge. His decision reflects a full and fair consideration of the suggested alternatives and all the circumstances surrounding the trial. His decision reflects that a "manifest necessity" existed because of the involuntary absence of the Appellant-Defendant and, therefore, that his decision to declare a mistrial "to insure a fair trial" (App., p. 20) and "in the interest of justice" (App., p. 20) was a proper exercise of his discretion.

In addition to insuring that the trial judge is scrupulous in the exercise of his discretion in finding the "manifest necessity" or "ends of public justice" which require a mistrial, this Court in United States v. Grasso, 552 F.2d 46 (2d Cir. 1977) has raised a procedural corollary which requires consideration and rejection of the procedural alternatives to mistrial in order for retrial not to be barred by the Double Jeopardy Clause. In Grasso, supra, at 54, this Court says:

" . . . [t]he appropriate course was to solicit suggested alternatives from defense counsel. . . . The responsibility, however, is on the Court to ask [for], and not on the defendant on his own to suggest, alternatives in a sua sponte mistrial situation. Useful alternatives may result from such an inquiry, although of course the court is free explicitly to reject them as inadequate to cure the situation."

This is exactly the course the trial judge took in this matter. It was the trial judge who raised the possibility of a mistrial and requested alternatives. (App., p. 13). He heard vigorous suggestions and arguments from both Counsel on what course of action should be taken. Over the course of the three hearings that morning the trial judge was made fully aware of the positions of both Counsel, and, as discussed above, he rejected the alternatives suggested by Defense Counsel, finding that the involuntary absence required a mistrial "to insure a fair trial" and to be "in the interest of justice."

Furthermore, the underlying situation in Grasso was one where the trial court declared a mistrial without hearing either side's view on the subject, without hearing any suggested alternatives, and without making any findings on alternatives. Just the opposite of these circumstances occurred in this matter; therefore, the sanction imposed in Grasso, which was a retrial as a violation of the Double Jeopardy Clause, is not appropriate in this matter. The trial judge herein made every effort to exercise his sound discretion to assure that, taking all the circumstances into account, there was a "manifest necessity" for his sua sponte declaration of this mistrial.

IV. CONCLUSION

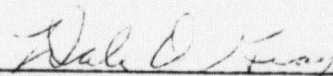
The trial judge properly exercised his discretion in declaring this mistrial in this matter. A "manifest necessity" existed and required that a mistrial be declared and the jury discharged. The "manifest necessity" arose from the "unforeseeable circumstances" of the Appellant-Defendant's emergency hospitalization during trial, his expected lengthy stay in hospital, and his resultant involuntary absence from trial. Because Rule 43, V.R.Cr.P., requires a defendant's presence at every stage of trial, with exceptions which are inapplicable to involuntary absences, the trial judge properly exercised his discretion in declaring a mistrial. Furthermore, the trial judge explored and rejected the suggested alternatives to mistrial. After a mistrial properly declared because of a "manifest necessity", retrial of a defendant is not barred by the Double Jeopardy Clause of the Fifth Amendment.

The Appellees, therefore, respectfully request this Court to affirm the Opinion and Order below.

DATED at St. Johnsbury, in the County of Caledonia, on this 3rd day of January, 1978.

Respectfully submitted,

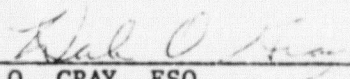
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CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of January, 1978, I served two copies of the foregoing Brief of the Respondents-Appellees upon the Appellant-Petitioner by mailing true conformed copies thereof to James L. Morse, Esq., Defender General, 141 Main Street, Montpelier, Vermont 05602.



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